

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re:	Application No. 10/763,376)	<i>Confirmation No. 7589</i>
Filed:	January 23, 2004)	
)	
Applicants:	Andrew HALLIDAY et al.)	
Title:	SYSTEM AND METHOD FOR THE PREPARATION OF BEVERAGES)	
Art Unit:	1794)	This Supplemental Appellants' Brief on Appeal was electronically filed on February 11, 2009 using EFS-Web.
Examiner:	Anthony J. WEIER)	
)	
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SUPPLEMENTAL
APPELLANTS' BRIEF ON APPEAL UNDER 37 C.F.R. § 41.37

Sir:

In response to the Notification of Non-Complaint Appeal Brief dated January 26, 2009, Applicants hereby respectfully submit the following Supplemental Brief in support of their appeal.

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SUPPLEMENTAL APPELLANTS' BRIEF ON APPEAL
UNDER 37 C.F.R. § 41.37 dated February 11, 2009
Reply to Office Communication of January 26, 2009
Decision of Primary Examiner of January 23, 2008

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I. REAL PARTY IN INTEREST

Kraft Foods R & D, Inc.

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

Claims 2-14 are pending. Applicants appeal the final rejection of claims 2-14. Claim 2 is the pending independent claim at issue in this appeal. Claim 1 is canceled.

IV. STATUS OF AMENDMENTS

No amendments have been entered after the Office Action of January 23, 2008.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The summary of the claimed subject matter involved in this Appeal is broken into two sections: a first section providing a concise explanation of the subject matter of the independent claim at issue, and a second section providing a map of the independent claim to representative page and line numbers and figures in Applicants' specification.

A. Concise Explanation of Subject Matter Defined in the Independent Claim Involved in the Appeal

The Independent claim relates to a method of preparing a beverage by first inserting a first beverage cartridge containing one or more beverage ingredients into a beverage preparation machine. (Specification, p. 3, lines 7-9.) Second, operating said beverage preparation machine to pass an aqueous medium through the first beverage cartridge to dispense a first portion of said beverage into a receptacle. (*Id.*, lines 10-13.) Third, inserting a second beverage cartridge containing one or more beverage ingredients into the beverage preparation machine. (*Id.*, lines 14-16.) Fourth, operating the beverage preparation machine to pass an aqueous medium through the second beverage cartridge to dispense a second portion of said beverage into the receptacle. (*Id.*, lines 17-20.) Either one of the first or the second beverage cartridges contains a liquid dairy-based ingredient. (*Id.*, lines 21-23.)

B. Map of Independent Claim to Specification and Drawings

Independent Claim No.	Relevant Specification Pages and Line Numbers	Relevant Drawings
2	Specification, p. 3, lines 7-23	-

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It should be understood that this summary and map of the independent claim is only intended as a brief summary. Applicants do not represent or intend that the summary and map, or the accompanying references to the drawings and the specification, comprise an exhaustive presentation of the claim. As always, all claims are to be viewed and interpreted within the legal framework for claim construction, which may include the context of the entire specification as a whole.

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VI. GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

- A. Are claims 4-6, 8-12, and 14 obvious under 35 U.S.C. § 103(a) over US 2003/0066431 A1 (Fanzutti et al.) (hereinafter "Fanzutti")?
- B. Are claims 2, 3, and 13 anticipated under 35 U.S.C § 102(e) by Fanzutti?
- C. Is claim 7 obvious under 35 U.S.C. § 103(a) over Fanzutti taken together with US 2001/0019735 A1 (Cirkel-Egner et al.) (hereinafter "Cirkel-Egner")?

VII. ARGUMENT

A. Claims 4-6, 8-12, And 14 Are Not Obvious Over Franzutti

1. Claims 4-6 Are Not Obvious Over Fanzutti Because Fanzutti Describes A Beverage System With Two Pod Holders For Simultaneous Dispensing Rather Than Sequential Dispensing

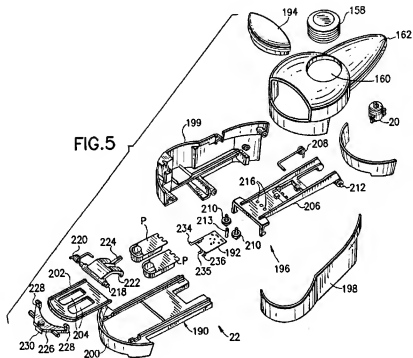
Claim 4 depends from independent claim 2 and includes all the method steps of this base claim for preparing a beverage. Dependent claim 4 requires

- inserting a first cartridge into a beverage preparation machine,
- passing an aqueous medium through the first cartridge to dispense a first portion of the beverage,
- inserting a second cartridge into the machine, and
- passing an aqueous medium through the second cartridge to dispense a second portion of the beverage.

In addition, claim 4 also defines the beverage preparation method as “comprising the step of removing the first beverage cartridge before inserting the second beverage cartridge.” That is, the claims relate to a sequential dispensing of the beverage portions. Fanzutti, on the other hand, discloses a method of using a single cartridge or the simultaneous use of two pods at the same time.

Fanzutti is directed to a system where two pods are present in the machine at the same time. Indeed, as plainly shown in FIG. 5 of Fanzutti, the coffee maker is provided with the tray 202 having two distinct coffee pod apertures 204 to simultaneously hold two pods (Fanzutti, ¶ [0067]), and also includes two piercing needles 400 and 401 to simultaneously pierce the two pods as shown in FIG. 17 (*Id.*, ¶ [0103]). Copies of FIGS. 5 and 17 from Fanzutti are reproduced below for convenience. Indeed, Fanzutti states “[t]he coffee pod holder is adapted to *simultaneously* hold at least two pods” (emphasis added) where “[t]he coffee pod

piercing system . . . has at least two needles connected to the fluid conduit system which are adapted to respectively pierce through the at least two pods in the coffee pod holder and allow heated water to separately flow into the at least two pods." (*Id.*, ¶ [0008]).



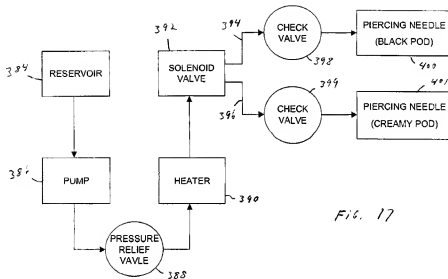


Fig. 17

The Office Action suggests that

Fanzutti et al discloses several start, stop scenarios wherein cartridges are removed and placed into the machine (paragraphs 103-106). It would have been obvious to one having ordinary skill in the art at the time of the invention to have provided cartridges in any manner of order as a matter of preference.

(Office Action, January 23, 2008, p. 3.) However, it is respectfully submitted that paragraphs 103-106 of Fanzutti do not disclose or suggest the sequential dispensing of beverage portions. Nowhere in these passages referred to by the Office Action does Fanzutti describe method steps of inserting a first cartridge, passing an aqueous medium through that cartridge, removing the first cartridge, and then inserting a second cartridge. While Fanzutti describes using a sensor to detect the presence of a cartridge and displaying an error message if the wrong cartridge is inserted into Fanzutti's brewer (Fanzutti, ¶ [0104]), it is respectfully

submitted that such disclosure is not a suggestion that the wrong cartridge is first used to dispense a portion of a beverage prior to being removed.

Even if it is assumed that Fanzutti discloses several start and stop scenarios because an incorrect cartridge is inserted into the machine, such disclosure does not provide any suggestion or reason for the sequential insertion of cartridges into a beverage preparation machine to sequentially prepare two portions of a beverage. Indeed, it does not necessarily follow from the disclosure in Fanzutti that an incorrectly inserted pod dispenses a beverage or that such an error message displayed by the Fanzutti brewer would lead one to sequentially prepare portions of a beverage. Fanzutti simply provides stopping for the removal of an incorrectly inserted pod.

While Fanzutti's brewer may have the capability of utilizing only one of its two apertures 204 in the beverage tray 202 to brew a beverage, this ability still does not provide any support for the Office Action's contention that it suggests a method for sequentially preparing two separate portions of a beverage one after the other. The theoretical possibility that such method steps could happen, without some articulated factual findings supported by the art of record does not establish obviousness. Indeed, the mere possibility that one of an infinite number of potential combinations could exist in the cited prior art does not result in the cited references disclosing or suggesting all claim elements. See, e.g., *Roscco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373, 1380-81 (Fed. Cir. 2002); *MEHL/Biophile Int'l Corp. v. Milgraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999); and *In re Rijckaert*, 9 F.3d 1531, 1534, 28 U.S.P.Q. 2d 1955, 1957 (Fed. Cir. 1993).

Rejections can not be based on the mere possibility or the mere probability that such result could have occurred, but based on articulated factual findings to support the claim of obviousness. (MPEP § 2143.) In this case, it is respectfully submitted that the Office Action has not articulated any factual findings, any reason, or any specific passage in the art of record that supports the contention that Fanzutti discloses or suggests the sequential dispensing of

separate portions of a beverage. Again, Fanzutti merely describes the detection of an incorrectly inserted pod and displaying an error message. Lacking such articulated support, a *prima facie* case of obviousness can not be supported over Fanzutti for claim 4. See MPEP § 2143 (referring to the factual findings necessary to support the rationales providing the basis for a contention of obvious and stating "if any of these finding can not be made, then this rationale can not be used to support a conclusion that the claim would have been obvious to one of ordinary skill in the art.") Applicants, therefore, request withdrawal of the rejection to dependent claims 4 to 6 for at least these reasons.

In addition, because dependent claim 4 includes all the subject matter of independent claim 2 from which it depends, claim 4 also requires one of the beverage cartridges to include a liquid dairy-based ingredient. As further discussed below, Fanzutti also fails to disclose liquid dairy-based ingredients, and claims 4 to 6 should be allowable for this additional reason.

2. Claim 14 Is Not Obvious Over Fanzutti Because Fanzutti Describes A Beverage System With Two Pod Apertures For Simultaneous Use Of Two Pods In Two SEPARATE Pod Apertures Rather Than Sequential Use Of Two Separate Pods In The SAME Cartridge Holder

Dependent claim 14 depends from claim 4 and, therefore, includes all the limitations of claim 4 and independent claim 2 from which claim 4 depends. As a result, claim 14 is patentable for the reasons already discussed above in Sub-Section 1 above. However, dependent claim 14 further requires "inserting the second cartridge into the *same* cartridge holder from which the first cartridge was removed." (Emphasis added.) There is plainly no support in Fanzutti to suggest such a method step was disclosed or suggested as an obvious modification of the brewing steps in Fanzutti. Notably, the Office Action has failed to specifically address this claim.

Again, to support a contention of obviousness, the Office Action must provide articulated findings why such a method step would have been obvious. (MPEP § 2143.) Here, because Fanzutti provides for two pod apertures 204 in its tray 202, it is respectfully submitted that there is nothing to support the suggestion that two sequentially used pods are inserted in the *same pod aperture* to sequentially prepare two portions of the beverage. Again, because Fanzutti is directed to simultaneous use of two pods within a holder having two apertures, there is plainly no support to suggest that Fanzutti also discloses or provides some reason to sequentially insert two of Fanzutti's pods into the *same aperture* within in its tray 202. Applicants, therefore, request withdrawal of the rejection to claim 14.

In addition, because dependent claim 14 ultimately depends from claim 2 and, therefore, includes all the subject matter of independent claim 2 from which it depends, claim 14 also requires one of the beverage cartridges to include a liquid dairy-based ingredient. As further discussed below, Fanzutti also fails to disclose liquid dairy-based ingredients, and claim 14 should be allowable for this additional reason.

3. Claims 8-12 Are Not Obvious Under 35 U.S.C. § 103(a) Over Fanzutti Because Fanzutti Provides No Disclosure Or Suggestion For The Use Of Concentrated Liquid Dairy Ingredients Or Liquid Dairy Ingredients Having Particular Solids And Fat Levels

Claims 8-12 ultimately depend from claim 4 and independent claim 2 from which claim 4 depends. Therefore, claim 8-12 are allowable for the reasons already discussed above in Sub-Section 1. In addition, dependent claims 8-12 further define the liquid dairy-based ingredient as

- being a concentrated dairy-based ingredient or a concentrated liquid milk (claims 8 and 9, respectively);
- having a total solids between 25 and 40 percent (claims 9 and 11, respectively); and
- having 0.1 to 12 percent fat (claim 12).

Again, Fanzutti describes non-dairy creamers and provides no disclosure for the particular compositions of these creamers. It is respectfully submitted that the Office Action simply brushes aside these limitations with the conclusion that "such determinations would have been well within the purview of a skilled artisan, and it would have been further obvious to have arrived at the concentration as claimed through routine experimental optimization." However, there is no support in Fanzutti or the other art of record that such solids and fat levels could have been obtained in dairy liquids, much less concentrated dairy liquids in beverage cartridges at the time this application was filed. It is respectfully submitted that liquid dairy based ingredients and concentrated liquid dairy-based ingredients required by the claims are quite distinct from non-dairy creamers and other coffee related condiments such as sugar and artificial sweeteners as provided in Fanzutti. Accordingly, Applicants respectfully request withdrawal of the rejections to claims 8-12.

B. Claims 2, 3, and 13 Cannot Be Anticipated By Fanzutti Because Fanzutti Does Not Disclose The Use Of A Liquid Dairy-Based Ingredient

Independent claim 2 requires, in addition to the method steps described above, “wherein that one of the first or second beverage cartridges contains a liquid dairy-based ingredient.” Fanzutti does not disclose a cartridge that contains a liquid dairy-based ingredient, as recited in claim 2, and by dependency in claims 3 and 13. (It is noted that all claims ultimately depend from claim 2 and include such limitation.) Instead, Fanzutti discloses in paragraphs 69 and 78 a pod having a “nondairy creamer,” which is quite distinct from a compositional standpoint from a liquid dairy based ingredient. Other mentions of creamer in Fanzutti, paragraphs 102 and 107, also fail to disclose a liquid or a dairy-based ingredient.

To anticipate a claim, the cited reference must disclose each and every element as set forth in the claim within a single prior art reference. (MPEP § 2131.) The issue with anticipation is not whether all limitations are somehow suggested by the reference, but whether all limitations are clearly disclosed either expressly or inherently in the single reference. To inherently disclose a limitation, the subject matter must be necessarily present in the reference. (MPEP § 2112.)

Fanzutti does not expressly or inherently disclose a cartridge having a liquid and a dairy-based ingredient, but *non-dairy creamers* (See, e.g., ¶¶ [0069] and [0078].) Non-dairy creamers and liquid dairy-based ingredients are distinct food compositions. Therefore, from the disclosure of a non-dairy creamer it does not necessarily follow that a liquid and a dairy-based ingredient would also be provided by the disclosure of Fanzutti. Again, rejections can not be based on theoretical possibilities.

As described in the present specification, page 2, “consumers consistently indicate that the use of such powdered dairy-based products adversely affects the taste, colour and texture of the final beverage. In addition, powdered dairy products cannot be used to produce an

authentic looking frothy milk-based foam as desired by consumers for cappuccino-style beverages.” Because Fanzutti does not disclose a cartridge that contains a liquid or even a dairy-based ingredient, it will also have the same disadvantage. In contrast, the use of a liquid dairy-based ingredient, as recited in claim 2, advantageously permits the ability to dispense liquid dairy-based ingredients for the formation of beverages having an authentic look, taste and mouth feel which have previously been possible using non-cartridge based systems such as the use of a separate steam wand to froth bulk quantities of milk. (Present specification, p. 4.)

The Office Action then suggests

Fanzutti further discloses the use of a few typical additives as well as “any other suitable coffee related condiment.” Clearly creamer or milk are notoriously well known coffee related condiments and would fall within such description.

(Office Action, p. 5.) Again, it is respectfully submitted that Fanzutti does not support the Office Action’s contention that a *liquid and dairy-based* (rather than the non-dairy creamers) were notoriously well known at the time of this application or would have necessarily been disclosed through the generic disclosure of a non-dairy creamer or other coffee condiment provided in Fanzutti. Fanzutti generically refers to non-dairy creamers, sugars, and artificial sweeteners, which are all quite distinct from liquid and dairy-based ingredients. As a result, Applicants respectfully request withdrawal of the rejections to claims 2, 3, and 13.

C. Claim 7 Is Not Obvious Over Fanzutti and Cirkel-Egner Because Neither Reference Discloses The Use Of Liquid Dairy-Based Ingredients

Claim 7 ultimately depends from claim 4 and, therefore, includes all the limitations of claim 4 and claim 2 from which it depends. The Office Action cites Cirkel-Egner for the disclosure of “coffee concentrate containers such as capsules to be used as dispenser

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containers in food service applications.” (Office Action, p. 4.) Therefore, Cirkel-Egner also does not disclose or suggest liquid dairy based ingredients in beverage cartridges and does not overcome the deficiencies of Fanzutti. Dependent claim 7, therefore, is allowable for the reasons already discussed above in Section A, which are incorporated herein by reference. Therefore, Applicants respectfully request withdrawal of the rejection to claim 7 for at least the same reasons as discussed in Section A.

VIII. CLAIMS APPENDIX

Claim 1 (Canceled)

Claim 2 (Original): A method of preparing a beverage comprising the steps of:

a) inserting a first beverage cartridge containing one or more beverage ingredients into a beverage preparation machine;

b) operating said beverage preparation machine to pass an aqueous medium through the first beverage cartridge to dispense a first portion of said beverage into a receptacle;

c) inserting a second beverage cartridge containing one or more beverage ingredients into the beverage preparation machine; and

d) operating the beverage preparation machine to pass an aqueous medium through the second beverage cartridge to dispense a second portion of said beverage into the receptacle;

wherein that one of the first or second beverage cartridges contains a liquid dairy-based ingredient.

Claim 3 (Original): A method as claimed in claim 2 wherein one of the first or second beverage cartridges contains an ingredient for forming a brewed portion of a beverage.

Claim 4 (Original): A method as claimed in claim 3 further comprising the step of removing the first beverage cartridge before inserting the second beverage cartridge.

Claim 5 (Original): A method as claimed in claim 4 wherein the beverage ingredient in the first or second beverage cartridge is roast and ground coffee.

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Claim 6 (Original): A method as claimed in claims 4 wherein the beverage ingredient in the first or second beverage cartridge is leaf-based tea.

Claim 7 (Previously Presented): A method as claimed in claim 4 wherein the beverage ingredient in the first or second beverage cartridge, prior to the step of operating said beverage preparation machine to pass an aqueous medium through the first beverage cartridge to dispense a first portion of said beverage into a receptacle, is a liquid coffee ingredient.

Claim 8 (Original): A method as claimed in claim 4 wherein the liquid dairy-based ingredient is a concentrated dairy-based product.

Claim 9 (Original): A method as claimed in claim 8 wherein the concentrated dairy-based product is concentrated liquid milk.

Claim 10 (Original): A method as claimed in claim 9 wherein the concentrated liquid milk contains between 25 and 40% total solids.

Claim 11 (Original): A method as claimed in claim 10 wherein the concentrated liquid milk contains 30% total solids.

Claim 12 (Original): A method as claimed in claims 11 wherein the concentrated liquid milk contains between 0.1 and 12% fat.

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Claim 13 (Original): A method as claimed in claim 12 further comprising the step of foaming the one or more liquid dairy-based ingredients during dispensation.

Claim 14 (Previously Presented): A method as claimed in claim 4 further wherein the step of removing the first beverage cartridge before inserting the second beverage cartridge includes removing the first cartridge from a cartridge holder and the step of inserting a second beverage cartridge containing one or more beverage ingredients into the beverage preparation machine includes inserting the second cartridge into the same cartridge holder from which the first cartridge was removed.

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IX. EVIDENCE APPENDIX

None.

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X. **RELATED PROCEEDINGS APPENDIX**

None.

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XI. CONCLUSION

In view of the foregoing discussion, Applicants respectfully request reversal of the rejected, pending claims.

Respectfully submitted,
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Dated: February 11, 2009

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